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ALDERWOOD MALL L.L.C.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

In re:

§ Chapter 11

STEEPOLOGIE, LLC,

§ Case No. 23-10671-HCM

Debtor.

§

**REPLY OF ALDERWOOD MALL L.L.C. TO DEBTOR'S
RESPONSE TO MOTION TO COMPEL PAYMENT OF POST-
PETITION RENT AND OTHER APPROPRIATE RELIEF**

Alderwood Mall L.L.C. ("Landlord"), in further support of its *Motion To Compel Payment of Post-Petition Rent and Other Appropriate Relief* [Docket No. 32] (the "Motion") respectfully submits this memorandum in reply to Debtor's *Response To Motion To Compel Payment of Post-Petition Rent and Other Appropriate Relief* [Docket No. 41] ("Response") as follows:

1. Debtor's Response to the Motion admits the essential facts, that monthly rent and charges for the month of September 2023 under the Lease¹ is the sum of \$6,980.00 (Response at

¹ Capitalized terms not otherwise defined shall have the same meaning as set forth in the Motion.

¶ 5) and that Debtor failed to pay this sum on account of post-petition, pre-rejection rent. (Response at ¶ 6). The Lease was rejected effective September 30, 2023 [Docket No. 44].

2. Debtor further admits that Landlord is entitled to an administrative claim for unpaid post-petition, pre-rejection rent but disputes Landlord's right to immediate payment under Bankruptcy Code section 365(d)(3). Instead, Debtor asserts, without citation to authority, that “[u]nder Subchapter V, a debtor is permitted to pay administrative claims over the life of its plan.”

(Response at ¶ 6.)

3. Debtor is obviously referring to Bankruptcy Code section 1191(e), which permits, in a Subchapter V plan to provide for “payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title.” Bankruptcy Code section 507(a)(2) expressly refers, in pertinent part, to administrative expenses allowed under section 503(b) of this title.

(Emphasis added.)

4. But unpaid post-petition, pre-rejection rent does not give rise to an administrative expenses “allowed under section 503(b) of this title.” This conclusion is supported by the plain language of Bankruptcy Code section 365(d)(3), providing that the debtor-in-possession is required (“shall”) to timely perform obligations arising from and after the petition date under any unexpired real property lease until such lease is assumed or rejected “notwithstanding section 503(b)(1) of this title.” (Emphasis added.)²

5. Indeed, Debtor’s argument that it is permitted to pay unpaid post-petition, pre-rejection rent “over the life of its plan” (Response at ¶ 6), is directly contrary to case law cited in

² It is important to note that this is not a case involving “stub rent,” i.e., the rent for the interim period between the day the order for relief was entered in the bankruptcy case and the end of that month.” *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 360 (Bankr. S.D.N.Y. 2008) (defining stub rent); compare *In re Appletree Markets, Inc.*, 139 B.R. 417, 421 (Bankr. S.D. Tex. 1992). All of the unpaid rent at issue here came due after the Petition Date and prior to the effective date of rejection of the Lease.

the Motion and ignored in Debtor's Response. In *In re Seven Stars on Hudson Corp.*, 618 B.R. 333, 347 fn. 82 (Bankr. S.D. Fla. 2020), the bankruptcy court explicitly addressed this issue:

Although new Bankruptcy Code section 1191(e) does permit payment of administrative expense claims under Section 503(b) through a plan (as opposed to the requirement for regular Chapter 11 cases that administrative expense claims be paid in full on the effective date of a plan, 11 U.S.C. § 1129(a)(9)(A)), the unpaid administrative rent here is not the type of administrative expense claim that would qualify for this treatment under Section 1191(e). Section 1191(e) specifically refers to claims of a kind specified in paragraphs (2) or (3) of Section 507(a). Section 507(a)(2) then refers to administrative expenses allowed under Section 503(b) (and Section 507(a)(3) refers to claims arising under Section 502(f) in involuntary cases, which is not applicable here). Nowhere in Section 503(b), however, is any mention of post-petition rent obligations. That is because a debtor's obligation to pay post-petition rent is governed solely by Section 365, not by Section 503(b). As such, *even though new Section 1191(e) permits certain administrative expense claims to be paid out over the term of a plan, this provision undoubtedly does not apply to administrative rent.*

(Emphasis added.)

6. Courts have warned against interpretations of Bankruptcy Code section 365(d)(3) "as a debtor-tenant's weapon to fend off landlords seeking rent owed to them under the lease." *Goody's Family Clothing, Inc. v. Mountaineer Prop. Co. II, LLC (In re Goody's Family Clothing, Inc.)*, 401 B.R. 656, 669 (D. Del. 2009), *aff'd In re Goody's Family Clothing, Inc.*, 610 F.3d 812 (3d Cir. 2010); *see also In re Pacific-Atlantic Trading Co.*, 27 F.3d 401, 405 (9th Cir. 1994) (rejecting an interpretation of Section 365(d)(3) that would reward trustees [or debtors-in-possession] for failing to timely perform lease obligations); *In re CEC Entertainment, Inc.*, 625 B.R. 344, 352 (Bankr. S.D. Tex. 2020) (Section 365(d)(3) "was added to the Bankruptcy Code to prevent commercial lessors from unwillingly extending credit to debtor-lessees during the pendency of a chapter 11 case.").

7. There is no authority, and certainly none is cited by Debtor, allowing Debtor to "finance" rent deferred under Section 365(d)(3) over the life of the case, only to be paid as an administrative claim at plan confirmation. Indeed, Congress knows how to authorize such deferral, as it did so as part of the 2020 amendment to Section 365(d)(3) (which "sunsetted" December 27,

2022), providing in subparagraph (B) that “[i]n a case under subchapter V of chapter 11,” the time for performance could be extended for an additional period of 60 days upon a showing of “material financial hardship” due to COVID-19 pandemic.³ Rent deferred under former Section 365(b)(2)(B) was treated, pursuant to former Section 365(b)(2)(C), “as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).” While these amendments expired last year by their terms, these provisions demonstrate “[a] familiar principle of statutory construction ... that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 578, 126 S.Ct. 2749 (2006); *see also Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S.Ct. 2035 (1993) (... “where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). Bankruptcy Code section 365(d)(3) now contains no provision for extended repayment, confirmed by the legislative history of the statute.

8. The only provision for deferral in the payment of post-petition, pre-rejection rent that remains in the Bankruptcy Code is contained in section 365(d)(3), providing that for "cause" shown, the bankruptcy court "may extend...the time for performance of any such [lease] obligation that arises within 60 days after the [petition] date..., but the time for performance shall not be extended beyond such 60 day period." The debtor has the burden of demonstrating cause for an extension of the performance obligation under Section 365(d)(3). *See, e.g., In re Pac-West Telecomm, Inc.*, 377 B.R. 119, 126 (Bankr. D. Del. 2007) (denying debtor's request for an extension).

9. But Debtor has not sought such relief here, simply exercising “self-help” through the non-payment of September 2023 rent and charges under the Lease, contrary to the mandate of

³ *See 3 Collier on Bankruptcy* (Matthew Bender 16th Ed. 2022) ¶ 365.LH[2][h], p. 365-124.

Section 365(d)(3). Even if the Debtor could make a belated showing of “cause,” and this Court granted relief, the rent amounts due during the first sixty (60) days of this Chapter 11 case would be required to be paid by Debtor by October 24, 2023 – sixty (60) days after the Petition Date. *In re CEC Entertainment, Inc., supra*, 625 B.R. at 352 (“ ... § 365(d)(3) expressly prohibits the Court from allowing extensions of more than sixty days after the order for relief.”).

For the foregoing reasons, the Motion should be granted.

Dated: October 23, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on October 18, 2023, a true and correct copy of the foregoing Motion was served via first class mail to all parties listed on the attached Service List and via the Court's Electronic Case Filing (ECF) system on counsel for Debtor, the Office of the United States Trustee, the Subchapter V Trustee and all parties registered to receive such service.

/s/ Mark A. Platt

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